

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(49)S
Sales Tax
November 3, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090811A

On August 12, 2009, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its purchases of waste disposal services are subject to sales and use tax. We conclude that the purchases are subject to tax.

Facts

Petitioner has a contract with a village in New York to operate and maintain the village's waste treatment facilities. It is required under the contract to dispose of residual waste processed at the village's treatment facilities. Petitioner hires waste hauling firms to dispose of the waste. Article 2 of Petitioner's contract with the village provides that "Municipality agrees to engage the Operator [Petitioner] as an independent contractor to operate and maintain" waste treatment facilities. Section 12.1 of the agreement provides that the relationship of Petitioner to the village is that of independent contractor for all purposes under this agreement except as provided in Section 4.10(a). Section 4.10(a) provides that Petitioner shall dispose of "Process Residue" (i.e., waste generated by the operation of the facilities) "[a]s an agent for the Municipality." Petitioner is required to absorb the cost of hauling waste unless the hauling fee is greater than the Baseline Tip Fee, which is defined in the contract as the sum of eleven and one half cents a gallon plus sales tax.

The village pays Petitioner a base fee for its services. This fee includes the cost of waste hauling unless Petitioner has paid a waste hauler more than 11.5 cents a ton, in which case the village is responsible for the portion of the fee above that amount. In either case, the waste hauling firm directly invoices Petitioner for the waste hauling services.

Petitioner contracts for waste disposal services in its own name.

Analysis

The application of sales tax to Petitioner's purchases depends on whether (1) Petitioner acts in a representative capacity as agent for the village in purchasing waste disposal services and (2) assuming that Petitioner is not the village's purchasing agent, whether Petitioner resells the waste disposal services to the village. Since Petitioner neither acts in a representative capacity in purchasing the waste disposal services nor resells the services as such, its purchases of the services are subject to sales tax under Tax Law section 1105(c)(5).

To establish an agency relationship, there must be a "manifestation" that Petitioner consents to act on behalf of the client, subject to its control, and that the client authorizes the fiduciary relationship. (*See, Matter of Hooper Holmes v Wetzler*, 152 AD2d 871, *lv den*, 75 NY2d 706; *Matter of Swet*, Dec Tax App Trib, February 22, 1991). Creating a valid agency relationship requires more than a pro forma appointment. Based on the principles of the common law of agency, the Department looks at the following factors in determining whether a purchase is exempt as the purchase of an agent of an exempt organization: (1) the agent must have the authority to legally bind the credit of the exempt organization at the time of the

purchase, such that the vendor can proceed against the exempt organization if the agent fails to pay; (2) the purchase must be within the authority granted by the exempt organization and the exempt organization must not grant more authority than it has (e.g., if a government entity would need to bid out the purchase of goods or services, so must its agent); (3) the agency appointment must be in writing and be in effect at the time of purchase; (4) the exempt organization must exercise the requisite amount of control over the agent; (5) the risk of loss of the item must be on the principal; and (6) the agent must disclose to the vendor that it is making the purchases as agent of the exempt organization and invoices must be made out in the exempt organization's name or the invoice must indicate that the purchase is being made by an agent of the exempt organization on behalf of the exempt organization (*see, Matter of West Valley Nuclear Services Co., Inc.*, Tax Appeals Tribunal, November 13, 1998, *confirmed* 264 AD2d 101, *lv denied* 95 NY2d 760; *Matter of MGK Constructors*, Tax Appeals Tribunal, March 5, 1992; *Matter of 7 World Trade Center*, Tax Appeals Tribunal, April 3, 2003; *Matter of Fagliarone, Grimaldi & Assocs.*, Tax Appeals Tribunal, May 4, 1989, *confirmed* 167 AD2d 767; *Rome Research Corporation*, Adv Op Comm T & F, TSB-A-00(47)S, November 20, 2000; and *Northrop Grumman Corporation*, Adv Op Comm T & F, TSB-A-00(11)S, February 29, 2000).

Petitioner is not acting as agent on behalf of its clients in regard to the purchase of waste disposal services. While its agreement with the village states that Petitioner acts as agent of the village in regard to the disposal of waste, Petitioner does not act as agent in the purchase of waste disposal service. Petitioner never identifies itself as agent of the village when purchasing waste disposal service and the sales invoice is made out to Petitioner. Thus, Petitioner never contractually binds the village to pay for the services provided by the waste disposal companies. In addition, Petitioner incurs economic risk in purchasing waste disposal services. It must absorb the cost of the service if the fee for the service is less than eleven and a half cents a gallon. In sum, Petitioner does not purchase waste removal services as agent of the village whether or not the fee for waste disposal services exceeds eleven and a half cents a gallon.

Petitioner's purchases of waste disposal services do not qualify for the resale exclusion because Petitioner is not providing a service to real property covered by Tax Law section 1105(c)(5). The village pays Petitioner to operate and maintain the village's waste treatment facilities. The operation and management of these facilities do not constitute the servicing or maintaining of real property for purposes of section 1105(c)(5). Therefore, Petitioner is not reselling as such the waste disposal services it purchases. Accordingly, Petitioner's purchases of waste disposal services are subject to sales tax.

DATED: November 3, 2009

/S/

Jonathan Pessen
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.